83-1269 No. 83-1269

In The

Supreme Court of the United States

October Term, 1983

EDWARD CONWAY,

Petitioner,

vs.

CONSOLIDATED RAIL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

(1) Whether the Federal Employers' Liability Act plaintiff was deprived of his statutory right to a jury decision of his FELA case when the appellate court overturned the jury's verdict in his favor by drawing its own evidentiary inferences and by applying its own policy judgment as to what practices are reasonable in the railroad industry.

(2) Whether the trial court committed reversible error in allowing the defendant Railroad to question the FELA plaintiff concerning disability benefits he received from the United States Railroad Retirement Board.

(3) Whether counsel for the plaintiff in a personal injury case tried in federal court has a right to suggest damage figures to the jury during summation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, Edward Conway, respectfully prays that a writ of certiorari issue to review the opinions and the corrected judgment of the United States Court of Appeals for the First Circuit, entered in this proceeding on November 2, 1983, and November 4, 1983, respectively.

OPINIONS BELOW

The United States Court of Appeals for the First Circuit's memorandum on the petition for rehearing is unpublished, and is reproduced at 1a. The First Circuit's opinion dated November 2, 1983, is reported at Conway v. Consolidated Rail Corporation, 720 F.2d 221 (1st Cir. 1983), and is reproduced here at 7a. The First Circuit's memorandum and order dated November 2, 1983, is unpublished, and is reproduced here at 14a. The rulings of the United States District Court for the District of Massachusetts denying the motions for judgment n.o.v. and directed verdict are unpublished, and are reproduced at 21a and 22a respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on November 2, 1983. A corrected judgment was entered on November 4, 1983. The plaintiff's Petition for Rehearing was denied on November 30, 1983. This Petition is filed within the 90-day requirement. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 45, Section 51 reads as follows:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

STATEMENT OF THE CASE

On July 25, 1979, the petitioner, Edward Conway, was employed as a passenger conductor by the Consolidated Rail Corporation ("Conrail"). That night, he was assigned to work Train 67, an Amtrak passenger train which runs between Boston and Washington, D.C. The

train had several new Am fleet passenger coaches, which are different from conventional or traditional coaches because their traps (i.e., the passageway steps leading down from the coach to the station platform) are narrower (A-87).* The space to walk down these Am fleet traps is only 24" wide (A-6, A-86). A photograph of the trap was admitted as Exhibit No. 1 (A-6).

The train had a baggage car in addition to the passenger coaches (A-5). Although a passenger could check a footlocker into the baggage car at the baggage room inside the station (A-20), there were no rules or regulations limiting the size or weight of luggage carried onto the Am fleet passenger coaches (A-148).

The train arrived in the Providence station at 11:05 p.m. The petitioner stood on the station platform to assist passengers disembarking. He noticed one passenger, a woman, attempting to disembark with a footlocker. The footlocker was two feet by four feet in size. The woman appeared to be having trouble with the footlocker. The footlocker was hanging off the top stair of the trap, and she seemed to be stuck there next to it (A-8-9). When the petitioner reached up into the trap to

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*Transcript page citations are to the Record Appendix in Docket No. 83-1371.

assist this passenger, she let go of the footlocker and it fell down the stairs of the trap, striking him in the chest with one corner and knocking him backwards onto the station platform (A-10-11).

The petitioner lost 83 days from work as a result of his injury, and exercised his statutory right to bring a jury suit against Conrail in federal court under the Federal Employers' Liability Act, 45 U.S.C. §51 et seq. ("FELA"). The United States District Court for the District of Massachusetts took jurisdiction pursuant to 45 U.S.C. §51. On March 31, 1983, the jury returned a verdict for the petitioner in the amount of $14,000, with a finding of fifty percent (50%) contributory negligence on the part of the petitioner. A judgment and amended judgment was entered for the petitioner on April 18, 1983, and April 22, 1983, respectively. The trial court denied the Railroad's motion for a directed verdict on March 31, 1983 (22a), and denied its motion for judgment n.o.v. on April 15, 1983 (21a).

Before denying the Railroad's motion for a directed verdict, the trial court made the following assessment of the facts (22a-27a).

First, the jury could reasonably find it was foreseeable that a passenger conductor would be called upon to assist passengers carrying a footlocker down the steep and narrow incline of the Am fleet trap (23a). Second,

the petitioner introduced "evidence [of] the design, the make-up, the configuration, the physical lay-out of those particular steps." (Id.) Third, the jury could find that the necessity of a conductor assisting a passenger down the trap with a footlocker "poses a particular, maybe if the jury would believe, unreasonable situation, leading to danger." (Id.). Fourth, the trial court noted that even "if there were some negligence on his part, or on her part, it doesn't wipe out or hold . . . the corporation harmless, from any negligence on its part." (23a-24a). In summation, the court noted

> we can take all of the circumstances, all of the events here, including the configuration of the trap and the nature of the object and that is reasonable that people would take on trunks on that except if they were prohibited from doing so, and that this would give rise to that particular occasion

of the petitioner's injury (24a). The Railroad already had stipulated that there were no rules or regulations limiting the size or weight of luggage carried onto the Am fleet passenger coaches (A-148). Given all this, the trial court concluded that the questions of foreseeability and negligence were for the jury to decide (26a; 27a)

The Railroad appealed the denial of its motions for directed verdict and for judgment n.o.v. (Docket No. 83-1371), and the petitioner appealed the trial court's

rulings allowing the Railroad to question him concerning his receipt of Railroad Retirement Board disability benefits and barring his counsel from suggesting damage figures to the jury during summation. (Docket No. 1344). On November 2, 1983, the United States Court of Appeals for the First Circuit issued an opinion overturning the jury's verdict and ordering entry of judgment for the Railroad. After drawing its own factual inferences concerning the cause of the petitioner's accident, the First Circuit held that the failure of the Railroad to promulgate any rules or regulations governing the size and weight of luggage carried onto passenger coaches was not unreasonable, and that the petitioner's injury was not foreseeable (7a-11a). Also on November 2, 1983, the First Circuit issued a memorandum ruling that the trial court did not err in allowing the Railroad to question the plaintiff concerning his receipt of Railroad Retirement benefits and in barring the petitioner's counsel from suggesting figures to the jury (14a-15a). In response to the petitioner's petition for rehearing, the First Circuit indicated that it overturned the FELA jury's verdict because it perceived "no evidence of negligence whatever." (2a).

REASONS FOR GRANTING THE WRIT

1. This Court's general practice of not granting certiorari to review evidence does not apply when a statutory right to a jury trial is in issue.

This Court has long recognized an important exception to its general practice of not granting certiorari to review evidence: when the lower court decision deprives the plaintiff of a statutory or constitutional right to a jury determination of his case. "Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination." Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 509 (1957); see generally R. Stern and E. Gressman, Supreme Court Practice §4.15 (5th ed. 1978). This issue most often arises in FELA or Jones Act cases in which the lower court prevents or overturns a jury's verdict in the plaintiff's favor. The rationale for granting certiorari in such cases is that the right to trial by jury

> is part and parcel of the remedy afforded railroad workers under the Federal Employers' Liability Act.... To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.

Bailey v. Central Vermont R. Co., 319 U.S. 350, 354 (1943). For decades, this Court has granted certiorari in such cases to determine if there is sufficient evidence to support the jury's verdict and, if there is, this Court has reversed the lower court's decision on the ground it deprives the plaintiff of his federal statutory right to a jury trial. Supreme Court Practice, supra, at 292-96.

The instant Petition squarely presents this Court with this right to jury trial issue. Here, the petitioner is an FELA plaintiff whose favorable jury verdict was respected by the trial court but overturned by the appellate court on sufficiency of evidence grounds. It is the role of an FELA jury to find facts and to draw inferences concerning any negligence by the railroad, and the criterion governing the grant of certiorari in cases such as this is whether the lower court's decision respects that imperative function of the FELA jury. Wilkerson v. McCarthy, 336 U.S. 53, 70-71 (1949). Since this Court recognizes its duty to preserve FELA plaintiffs' statutory right to a jury trial, certiorari must be granted here in order for this Court to apply and to reaffirm its standard for the judicial review of FELA verdicts.

2. By departing from this Court's standard for the judicial review of FELA verdicts, the lower court's decision deprives the petitioner of his statutory right to a jury trial.

The standard for the judicial review of FELA verdicts was fashioned by this Court in a long line of cases stretching back now through the past four decades. See cases and authorities cited at 9 Wright & Miller, Federal Practice and Procedure: Civil §2526 n. 80 (1971). The leading case is Rogers v. Missouri Pacific R. Co., 352 U.S. 500 (1957). There, the appellate court overturned the jury's verdict in favor of the FELA plaintiff on the ground of insufficiency of evidence. This Court reversed, holding:

> Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a

> case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due "in whole or in part" to its negligence (Emphasis added.)
>
> . . . for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference.

Rogers, supra, at 506-08. Thus, when reviewing the denial of a motion for directed verdict or judgment n.o.v. in an FELA case, the appellate court cannot weigh conflicting evidence, cannot pass on the credibility of the witnesses, and cannot substitute its judgment for that of the jury. Rather, the court must view the evidence tending to support the plaintiff's claim that the railroad was negligent, and if but one scintilla of evidence able to support an inference — however improbable — that the railroad was negligent emerges from such a viewing, then the court must affirm the denial of the motion for directed verdict or judgment n.o.v. See 9 Wright & Miller, Federal Practice and Procedure: Civil §2526 (1971).

As the trial court recognized, there was sufficient evidence to support the jury's finding that the petitioner's injury was caused to some degree by negligence on the part of the Railroad. The jury had the following facts before it: the new Am fleet trap was unconventionally narrow (24") and steep; the Railroad had a baggage car attached to the passenger coaches capable of safely carrying footlockers and other large and heavy objects; the Railroad failed to promulgate any rules or regulations governing the size or weight of objects brought on board passenger coaches; the petitioner was injured when he reached up into the trap to assist a passenger who became stuck at the top of the trap while trying to exit with a 2' by 4' footlocker.

From these facts, the jury was free to draw the following inferences: that it was foreseeable that the petitioner in the course of his work would be called upon to assist passengers down the narrow trap; that absent any rules or regulations governing the size and weight of objects brought on board the passenger coaches, it was foreseeable that the petitioner would be called upon to assist passengers with objects so large or so heavy as to create an unreasonable risk of injury to the petitioner; that it was unreasonable for the Railroad to fail to promulgate any rules or regulations governing the size and weight of objects brought on board the passenger

coaches, particularly in light of the fact that a baggage car capable of safely carrying large and heavy objects was attached to the train; and that the petitioner was partly at fault for the injury since he failed to communicate successfully with the passenger concerning her handling of the footlocker.

And indeed, the jury found that the Railroad was 50% responsible for the injury due to its failure to foresee the problem and to promulgate any rules or regulations, and that the petitioner was 50% at fault for his failure of communication. These findings were fully supported by the facts and by the inferences the jury was entitled to draw from those facts.

The lower court's decision departed from this Court's standard of review in several respects. It did not narrowly limit itself to "the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death," even if the proof of the negligence is entirely circumstantial and even if other inferences are more probable. Rogers, supra, at 507. Instead, the lower court drew its own inferences concerning the causation of the injury and applied its own policy judgments as to what practices are reasonable or desirable in the railroad industry.

The lower court drew its own inference concerning the causation of the accident. After quoting fragments of the petitioner's testimony, the First Circuit stated:

> The difficulty, in other words, was not that the luggage was too large to pass through, but simply that the passenger had trouble handling the descent, and compounded the problem by letting go without warning.

(9a; 720 F.2d 221, 223). The test is not what inference the First Circuit would draw, but whether there were facts from which the jury could draw an inference — however improbable — that the petitioner's injury was caused to some extent by negligence on the part of the Railroad. The jury certainly did have facts before them supporting an inference that the footlocker was too large to pass safely down the trap: the footlocker was 2' by 4', and the steep trap had only 24" clearance. And, as noted above, given the fact that the petitioner was obliged to help passengers disembark down the steep and narrow trap, the jury was entitled to infer that the Railroad's failure to promulgate any rules or regulations limiting the size and weight of objects brought onto the new Am fleet passenger coaches created an unreasonable risk of harm to the petitioner (especially in light of the fact that a baggage car was available).

The lower court also substituted its own policy judgments as to what practices are desirable in the railroad industry for the jury's findings of reasonableness:

> A rule restricting luggage to an arbitrary maximum that all passengers could comfortably handle would manifestly exclude much more than footlockers, and would work to the serious disadvantage of a great many.
>
> . . . A conductor cannot expect that capable male passengers be limited to packages that can be carried, without needing help, by less capable females; but the alternative would be varying maximums, based upon sex, age, or whatever, in operation worse, even if not regarded as discriminatory.
>
> Plaintiff would revolutionize the railroad industry because of one unwise passenger in twenty-seven years — this was apprently plaintiff's first such accident .... Even if trouble from passenger clumsiness be thought more foreseeably possible, this was part of the job. Assuming no threat to other passengers [citation omitted], we are unpersuaded that there should be such absolute limitations on carry-on luggage as would achieve total security for conductors.

(10a-11a; 720 F.2d 221, 223-24). It is the function of the FELA jury — not the reviewing court — to make findings as to whether railroad practices are reasonable or unreasonable. Here, the FELA jury found that the Railroad's failure to promulgate <u>any</u> rules or regulations governing the size and weight of objects brought onto the Am fleet passenger coaches created an unreasonable risk of harm to the petitioner-employee.

The First Circuit overturned the jury's verdict based on its perception that such rules or regulations "would work to the serious disadvantage of a great many" and perhaps discriminate between "capable male passengers" and "less capable females". The proper test, however, is not whether the jury's verdict conforms with the reviewing court's policy judgment as to how best to run a railroad. Similarly, the First Circuit accuses the petitioner of attempting to "revolutionize the railroad industry because of one unwise passenger in twenty-seven years." This statement totally ignores the fact that the Am fleet traps were new, and markedly narrower than the traditional traps. The First Circuit noted, "Even if trouble from passenger clumsiness be thought more foreseeably possible, this was part of the job." If passengers are expected to be clumsy, that is all the more reason for the Railroad to promulgate some rules to govern the size and weight of objects brought onto the coaches.

Finally, the First Circuit stated "we are unpersuaded that there should be such absolute limitations on carry-on luggage as would achieve total security for conductors." The issue is not "absolute limitations" or "total security," but whether the Railroad's failure to promulgate any rules or regulations governing the size and weight of objects brought onto Am

fleet coaches created an unreasonable risk of harm to employees such as the petitioner. The jury found that it did. Instead of reviewing the factual basis of that finding, the First Circuit applied its own policy judgments as to the desirability of practices within the railroad industry.

A jury verdict cannot be taken away from an FELA plaintiff unless this Court's standard of review is applied. Such was not the case here. The petitioner respectfully requests that certiorari be granted to review the First Circuit's judgment, or, in the alternative, that an order issue summarily reinstating the jury's verdict (with costs and interest).

3. The lower court's decision allowing the FELA petitioner to be questioned concerning his receipt of Railroad Retirement Board benefits is in direct conflict with a decision of this Court.

The trial court's ruling allowing the Railroad to question the plaintiff concerning disability benefits he received from the United States Railroad Retirement Board is in direct conflict with this Court's opinion in Eichel v. New York Central R. R. Co., 375 U.S. 253 (1963). There, this Court emphatically held that Railroad Retirement Board disability benefits are a collateral source strictly inadmissible in FELA jury trials. Eichel, supra, at 255. During the trial of this case, the following questions transpired:

Q. Mr. Conway, were you paid any money whatsoever by the railroad for the 83 days you were out of work?

A. I wasn't paid one penny.

MR. CAHILL: Thank you.

Re-Cross Examination by Mr. Farrell.

Q. Mr. Conway, were you paid a weekly sum of money by the Railroad Retirement Board for the period of time you were out?

MR. CAHILL: Objection, Your Honor.

THE COURT: The objection's overruled.

Q. (By Mr. Farrell). Were you paid a weekly sum of money by the Railroad Retirement Board for every week that you were out of work?

A. Yes.

Q. And, how much were you paid by the Railroad Retirement Board per week?

MR. CAHILL: Objection, Your Honor.

THE COURT: Overruled.

THE WITNESS: Approximately $125 a week.

MR. FARRELL: No further questions.

(A-147). The First Circuit's opinion upholding the trial court's allowance of such questioning reads in full as

follows: "Briefly, plaintiff, having quite unnecessarily raised the issue of outside payments, could not object to the subject's continuance." (15a). The petitioner was asked only whether he received any money from the Railroad (i.e., Conrail) when he was out of work. The United States Railroad Retirement Board is entirely separate and distinct from Conrail. Conrail did not pay the petitioner any disability benefits, the Retirement Board did. Petitioner did not raise the issue of "outside payments", only payments from the Railroad itself. Under Eichel, the trial court's allowance of such a line of questioning was fatally prejudicial and constitutes reversible error.

4. The lower court's decision barring counsel for the plaintiff in a personal injury suit tried in federal court from suggesting damage figures to the jury during summation presents an important federal procedural issue and is in direct conflict with the caselaw and practice of another Circuit.

The scope of counsel's arguments to a federal jury is a procedural question governed by federal law, Duncan v. St. Louis-San Francisco Ry. Co., 480 F.2d 79, 84 (8th Cir.), cert. denied, 414 U.S. 859 (1973), and the right of counsel to suggest damage figures to a federal jury deciding a personal injury case is an important federal procedural issue not yet ruled on by this Court. The practice of allowing plaintiff's counsel to suggest per-

sonal injury damage figures to the jury is firmly established in the Second Circuit, Modave v. Long Island Jewish Medical Center, 501 F.2d 1065, 1079 (2d Cir. 1974), Mileski v. Long Island R.R., 499 F.2d 1169, 1174 (2d Cir. 1974), Philadelphia & Reading Ry. v. Skerman, 247 F. 269, 271 (2d Cir. 1917). Yet the trial court summarily barred the petitioner's counsel from suggesting an appropriate dollar figure for the jury to consider (A-174-175), and the First Circuit affirmed the trial court's exclusion of that line of argument on the ground that "Counsel was, in effect, proposing to testify." (15a). Such a ruling is in direct conflict with the Second Circuit's caselaw and practice. This is a ubiquitous federal procedural issue not previously ruled on by this Court. A ruling is necessary from this Court in order to establish a uniformity of practice among the federal circuits concerning the conduct of personal injury suits tried in federal district courts.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the First Circuit, or, in the alternative, an order should issue summarily reinstating the jury verdict (with costs and interest), or, in the alternative, an order should issue vacating and remanding the judgment with instructions to grant the petitioner a new trial.

Respectfully submitted,

CHARLES C. GOETSCH
Attorney for Petitioner

MEMORANDUM AND ORDER ON PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1371

EDWARD CONWAY,
Plaintiff, Appellee,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant, Appellant.

Before Bownes, Circuit Judge,
Aldrich and Skelton,* Senior Circuit Judges.

Memorandum and Order
On Petition for Rehearing

Entered: November 30, 1983

If the time for filing a petition for rehearing runs from the date of the judgment, this one was filed three days late. If it is extended by a technical correction of

* Of the Federal Circuit, sitting by designation.

the judgment, it was one day late. There was no motion to extend time, let alone reason for delay offered. The petition is rejected as untimely.

We would add that there is no merit in any event. We are not questioning or departing in any way from Rogers v. Missouri Pac. R. Co., 352 U.S. 500 (1957), regarding causation, or the degree of negligence. Rather, we held, for reasons given, that there was no evidence of negligence whatever.

Nothing in the petition rebuts that conclusion. Rather, petitioner, by truncating the testimony, improperly charges us with misstating the evidence. We adhere to our statement thereof.

By the Court,

Francis P. Scigliano
Clerk.

CORRECTED JUDGMENT

UNITED STATES COURT OF APPEALS
OF THE FIRST CIRCUIT

No. 83-1344

EDWARD CONWAY,
Plaintiff, Appellant,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant, Appellee.

No. 83-1371

EDWARD CONWAY,
Plaintiff, Appellee,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant, Appellant.

CORRECTED JUDGMENT

Entered November 4, 1983

These causes came on to be heard on appeals from the United States District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged, and decreed as follows:

The judgment of the District Court is vacated and the cases are remanded to the District Court with instructions to enter judgment for the defendant.

By the Court:

Francis P. Scigliano
Clerk.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1344

EDWARD CONWAY,
Plaintiff, Appellant,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant, Appellee.

No. 83-1371

EDWARD CONWAY,
Plaintiff, Appellee,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant, Appellant.

JUDGMENT

Entered: November 2, 1983

These causes came on to be heard on appeal from the United States District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgments of the district court are affirmed.

By the Court:

Francis P. Scigliano
Clerk

OPINION

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 83-1344

EDWARD CONWAY,
Plaintiff, Appellant,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant, Appellee.

No. 83-1371

EDWARD CONWAY,
Plaintiff, Appellee,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. David S. Nelson, U.S. District Judge]

Before

Bownes, Circuit Judge,
Aldrich and Skelton*, Senior Circuit Judges.

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* Of the Federal Circuit, sitting by designation.

George J. Cahill, Jr., with whom Cahill & Goetsch, P.C. was on brief, for Edward Conway.

Deirdre H. Harris, with whom Robert L. Farrell, and Parker, Coulter, Daley & White were on brief, for Consolidated Rail Corporation.

November 2, 1983

ALDRICH, Senior Circuit Judge. These are cross appeals following a jury verdict for the plaintiff in an FELA case. 45 U.S.C. §§51 et seq. We need consider only the question of defendant's liability. Plaintiff Conway was a conductor in the employ of defendant Consolidated Rail Corp., which supplied the services for a passenger train operated by Amtrak between Boston and New York. Plaintiff was injured assisting a female passenger to alight at Providence with what he described as a footlocker or suitcase. He, the only witness, stated this was "probably . . . four feet long and probably two feet wide." The third dimension, whether more or less than two feet, was not given. Nor, although plaintiff stresses weight in his brief, was there any evidence thereof, beyond whatever inference there may be from the fact that the passenger had apparently carried it on originally. Plaintiff had not seen her board, having had various duties before the train started.

The passageway from the car down to the station platform, somewhat ironically known as the "trap," presumably because it had a combination trap door and platform, was 28" wide, 24" between the handrails. Plaintiff observed that the passenger "couldn't handle the suitcase. She couldn't get down." "[I]t was hanging off the top stair . . . platform . . . a couple of feet . . . . I reached up with both hands. . . . She let the suitcase go and it came down on top of my chest." The difficulty, in other words, was not that the luggage was too large to pass through, but simply that the passenger had trouble handling the descent, and compounded the problem by letting go without warning.

Based on the stipulated fact that there was "no rule or regulation with respect to taking luggage aboard an Amtrak car," viz., so as to provide that items beyond some (unspecified) size be excluded in order to prevent such occurrences, plaintiff claims he was not furnished a safe place to work. He introduced no evidence that any other railroad had a rule on this subject. See Kuberski v. New York Central R.R., 2 Cir., 1966, 359 F. 2d 90, 95 (evidence of industry practice should be the test of employer diligence, in the absence of proof to the contrary). Cf. Lynch v. Pennsylvania R.R., 1947, 320 Mass. 694, 71 N.E. 2d 114 (limitation with respect to luggage permitted inside the car, as distinguished from

the vestibule). Nor was there any expert testimony, either as to need, or how size should be regulated.

Luggage is important to passengers, and carry-on is an expected convenience. Passengers of every sort and strength travel on trains. Plaintiff conceded that others had carried footlockers without incident. A rule restricting luggage to an arbitrary maximum that all passengers could comfortably handle would manifestly exclude much more than footlockers, and would work to the serious disadvantage of a great many.

It is black letter law that an FELA plaintiff is not entitled to absolute security; the act, unlike workmen's compensation statutes, does not make the employer an insurer. Inman v. Baltimore & Ohio R.R., 1959, 361 U.S. 138, 140. It "does not contemplate absolute elimination of all dangers, but only the elimination of those dangers which could be removed by reasonable care on the part of the employer." Padgett v. Southern Ry., 6 Cir., 1968, 396 F.2d 303, 306. Reasonable care must mean reasonable in light of the normal requirements of the job. A yardman dealing with moving cars cannot expect the same safety as a clerical worker in a ticket office. Here luggage is part of the work. A conductor cannot expect that capable male passengers be limited to packages that can be carried, without needing help, by less capable females; but the alternative would be varying maximums, based

upon sex, age, or whatever, in operation worse, even if not regarded as discriminatory.

Plaintiff would revolutionize the railroad industry because of one unwise passenger in twenty-seven years — this was apparently the plaintiff's first such accident. Cf. Inman, ante, (not negligence not to anticipate accident that had not occurred during plaintiff's seven years on the job); cf. New York, New Haven & Hartford R.R. v. Cragan, 1 Cir., 1965, 352 F.2d 463, cert. denied, 386 U.S. 1035. Even if trouble from passenger clumsiness be thought more foreseeably possible, this was part of the job. Assuming no threat to other passengers, cf. Lynch v. Pennsylvania R.R., ante, we are unpersuaded that there should be such absolute limitations on carry-on luggage as would achieve total security for conductors.

Although plaintiff argues it only in terms of affecting the issue of contributory negligence, we will deal with his claim that the court erred in excluding his testimony that he did not "have any authority to stop a passenger from boarding a train with a footlocker," in case such evidence be thought material to the issue of defendant's negligence. Our first question is how, under the circumstances, he was hurt by the exclusion of this testimony. We observe at the outset that his counsel stated to the jury, in positive terms, that this was what the record already showed.

> "Now, Mr. Conway has no authority to tell passengers that they can't bring the luggage on the train. All he can do is perform his job. In order for him to instruct any passenger that the suitcase is over-dimensional, or this footlocker, he would have to have the authority to do so. There would have to be a rule or regulation stating that there is limitations on baggage being brought upon the coaches. There is no such rule, and this is what the plaintiff believes is an unreasonable risk to Mr. Conway."

Neither the defendant nor the court objected to this statement. Plaintiff would run with the hare and hunt with the hounds. If this was what the stipulation meant, he could not be prejudiced by not being allowed to testify to like effect; the stipulation ended the matter. If it was not what it meant, it was most improper to tell the jury otherwise.

Although this should end the matter regardless of what the stipulation meant, we remark that the court was correct in any event. It interpreted the proposed testimony to relate to written rules and regulations, and held that as to this plaintiff's proffer was not the best evidence. It stated, however, that the witness could testify "what his responsibilities are." This avenue plaintiff failed to pursue.

The wisdom of the court's ruling was demonstrated when, on cross-examination of plaintiff, defendant

inquired, and brought out that he was "responsible to see to the safe passage of the passengers . . . [and was] in control of the entire train." On this basis plaintiff's proposed testimony that he could not exclude a footlocker (on the assumption that it was unsafe) was a legally incorrect conclusion. The power to exclude articles truly unsafe was inherent in what plaintiff said were his responsibilities. There was no error in the ruling.

Plaintiff's other points are mooted.

Judgment for defendant.

MEMORANDUM AND ORDER

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1344

EDWARD CONWAY,
Plaintiff, Appellant,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant, Appellee.

No. 83-1371

EDWARD CONWAY,
Plaintiff, Appellee

v.

CONSOLIDATED RAIL CORPORATION,
Defendant, Appellant.

Before Bownes, Circuit Judge,
Aldrich and Skelton*, Senior Circuit Judges.

MEMORANDUM AND ORDER

Entered: November 2, 1983

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* Of the Federal Circuit, sitting by designation.

Per Curiam. It does not appear why these appeals were not consolidated, but to have two essentially duplicated appendices was quite uncalled for. Before assigning costs, however, we turn to the merits.

Plaintiff appellant's first three points are unsustainable, (1) Briefly, plaintiff, having quite unnecessarily raised the issue of outside payments, could not object to the subject's continuance. (2) Already dealt with. (3) Counsel was, in effect, proposing to testify. The court was correct in excluding.

As to point (4), defendant's claim is absurd. This was not the exceptional case of an appeal from an allegedly erroneous assessment by the jury, but was from alleged errors committed by the court during trial. However, almost no appendix pages are represented by this.

We conclude that, since plaintiff has lost his appeal he could not, in a final accounting, collect for any of his appendix, all of defendant's counter designation having proved ultimately correct. On the other hand, there was no reason for defendant to repeat the reproduction. The cases were to be argued together, and defendant should, at the least, have sought leave to incorporate the first appendix by reference. Accordingly,

we allow no appendix cost for second appeal. Except for its appendix, defendant to recover its costs on both appeals.

By the Court:

Francis P. Scigliano
Clerk.

AMENDED JUDGMENT

AMENDED JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Judge David S. Nelson

No. 80-2075-N

EDWARD CONWAY,
Plaintiff

v.

CONSOLIDATED RAIL CORPORATION,
Defendant.

Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED

The jury having returned a verdict for the plaintiff, Edward Conway, in the amount of fourteen thousand dollars with contributory negligence in the amount of fifty percent, and the Court having DENIED the defendant's motion for a directed verdict;

IT IS ORDERED AND ADJUDGED that judgment be entered and is hereby entered for the Plaintiff, Edward Conway, in the amount of seven thousand dollars ($7,000.00).

CLERK
George F. McGrath

DATE
April 22, 1983

(BY) DEPUTY CLERK
Francis B. Dello Russo

JUDGMENT

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Judge David S. Nelson

No. 80-2075-N

EDWARD CONWAY,
Plaintiff

v.

CONSOLIDATED RAIL CORPORATION,
Defendant.

Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED

The jury having returned a verdict for the plaintiff, Edward Conway, in the amount of fourteen thousand dollars with contributory negligence in the amount of fifty percent, and the Court having Denied the defendant's motion for a directed verdict;

IT IS ORDERED AND ADJUDGED that judgment be entered and is hereby entered for the Plaintiff, Edward Conway, in the amount of fourteen thousand dollars ($14,000.00).

CLERK
George F. McGrath

DATE
April 18, 1983

(BY) DEPUTY CLERK
Francis B. Dello Russo

RULING DENYING MOTION FOR JUDGMENT N.O.V.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

EDWARD CONWAY,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO. 80-2075-N
	)	
VS.	)	
	)	DEFENDANT'S MOTION FOR
CONSOLIDATED RAIL	)	JUDGMENT NOTWITH
CORPORATION,	)	STANDING THE VERDICT
	)	UNDER RULE 50(b)
Defendant.	)	

The defendant moves that the judgment entered for the plaintiff herein be set aside and that a verdict be directed in its favor in accordance with the Motion for Directed Verdict which was filed at the close of the evidence.

By its Attorneys,

Robert L. Farrell
Parker, Coulter, Daley & White
One Beacon Street
Boston, MA 02108
(617) 723-4500

Denied: Davis S. Nelson, D.J., 4/15/83

RULING DENYING MOTION FOR DIRECTED VERDICT

THE COURT: May I ask a couple of questions? Just on this last point. You suggest what is correct law is that, of course, Consolidated had a responsibility of providing a safe place which their employees worked.

MR. FARRELL: Correct, Your Honor.

THE COURT: And, so, if it was reasonable that, to require that a railroad company prohibit the carriage of trunks such as was described in this particular case, and that corporation failed to make such a prohibition, therefore giving rise to a potential of an injury or an occurrence such as this, couldn't one say that the negligence of Consolidated was its failure to provide a safe place in which for its workers to work, if not at all. And, that would be the thrust of the plaintiff's claim.

MR. FARRELL: Well - - -

THE COURT: Well, if you knew that, if Consolidated knew that there was no regulation against carrying wild beasts on the railroad car without restraint and the railroad knew that and wouldn't the railroad have some responsibility, then, not to put its workers in a place such as that?

MR. FARRELL: I would agree with Your Honor's interpretation of the law with respect to the employer's responsibility. I do submit, however, that that thesis simply doesn't apply to the facts in this case.

THE COURT: Well, let's go back to that a bit. I think what the plaintiff is saying is, does not make your analogy appropriate perhaps. And, that is, that what was, what the negligence was, if there were any, is, and what was foreseeable, was that somebody, and let's say without being intimidated by sexism, that if a woman were carrying a heavy trunk that it's reasonable to perhaps expect the conductor having the responsibility that he has, would be called upon by those circumstances to assist her carrying that trunk down that type of incline. And, what, as opposed to, that is, if you were carrying a box of chocolates, to expect that he would offer her that same kind of assistance or that it would pose the same kind of problem under all those circumstances. And, the circumstances that he sought to introduce into evidence was the design, the make-up, the configuration, the physical lay-out of those particular steps. That poses a particular, maybe if the jury would believe, unreasonable situation, leading to danger because it's not a box of chocolates, it's not a suitcase. It was a heavy, or heavy-looking even, object, a trunk with and without anything more, there would be some, and with the conductor there available, there may be some responsibility, or perceived responsibility at least, upon the conductor's part, to assist her. And, so, that if there were some negligence on his part, or on her part, it doesn't wipe out or hold him harmless from any, it harmless, the corporation harmless,

from any negligence on its part. And, we can take all of the circumstances, all of the events here, including the configuration of the trap and the nature of the object and that is reasonable that people would take on trunks on that except if they were prohibited from doing so, and that this would give rise to that particular occasion, could the jury then impute or resolve in favor of the plaintiff.

MR. FARRELL: Well, what I'm trying to say, Your Honor, is that, and I would agree that there may be some circumstances, such as the one that you outlined with unrestrained handlings aboard a train. It would create an obvious danger. I am so, what I am trying to say is that the failure to have a rule or regulation with respect to the size of luggage does not create a dangerous place in which to work. As a matter of fact, I would suggest to Your Honor that it would be almost impossible to come up with a rule or regulation of this type. Now, you can have a small bag, you could have a woman carrying a small bag loaded with gold bars that is very heavy.

THE COURT: Would you agree, you would agree, I don't know. You see, I guess I have a little problem by this talk about rules and regulations. Plaintiff, counsel, placed a lot of emphasis on the absence of a rule and regulation. It seems, I mean, I don't know what that really means, except that, if that is just a simple

permission or allowance of the practice of bringing heavy materials, such as a trunk and so-forth, onto a train, under the circumstances that these trains operate, including the well. But, but, it's that you know that airplane passengers have rules and regulations about what can come onto an airplane. They certainly won't let you take a trunk onto an airplane. You knew that one time, at least, very recently, up to very recently, that they wouldn't permit luggage up on top of the overhead in an airplane presumably for fear that if something happens, it would spring open and cause injury. And, so, they made rules and regulations pertaining to what types of luggage is permitted on the interior, in the passenger interior of the airplane as opposing to the luggage. And, then, I suppose that the railroads, as a matter of fact, would have a rule and regulation, if not a practice, that would not permit somebody to bring a trunk onto a train and leave it in the aisle of the train. They'd have to have a place appropriate for it and I suppose they have some rule or regulation not allowing passengers to bring automobiles onto a passenger train. It's ridiculous as I've made it. Do you follow me?

MR. FARRELL: Yes, Your Honor. With respect to airplanes, I suggest that the principle reason for restricting the size of luggage aboard an airplane is because of space limitations. Now, apparently in this

case, Mr. Conway testified that they did have a storage area abroad the car, where they stored luggage of this sort.

THE COURT: So, why then, is all this a question for the jury to decide, decide whether what the railroad did was reasonable or that, indeed, what happened was not foreseeable?

MR. FARRELL: Well, because, we're getting back again to the first question, my first argument, number one, that there is no evidence which would, there is no evidence except speculation as to whether or not it was unreasonable not to have such a rule and two, there is no evidence that the presence of this luggage was the proximate cause of what happened. It was the girl, the girl.

THE COURT: Okay. I get you now. Anything else?

MR. CAHILL: I just want to add that the plaintiff testimony was that the girl was stuck, that her left foot was on the top step, that her right foot was still on the platform, the footlocker was along her side and that she was stuck when he observed. Also, he testified that the footlocker weighed approximately 100 pounds.

THE COURT: What was that by the way?

MR. CAHILL: The footlocker was stuck as the

woman was trying to walk down the trap because of the width. She was stuck, she had her first foot on the top, the left foot on the top step and her right foot on the platform. I think he testified that she appeared stuck. And, that, also, the plaintiff maintains the footlocker being permitted on the train - - -

THE COURT: Okay, I'm going to rule on it momentarily . . .

AFTERNOON SESSION

THE COURT: I have decided to deny the motion for a directed verdict, would lead to counsel to reassert the motion of judgment notwithstanding a verdict. I believe the issues are close enough so that it would avail all of us to have a jury determination, and then, I will pick up on the motion again. And, that is not to suggest that I'm going to rule favorably on this. It's just that I'll be able to do it in a more formal and complete way.

No. 83-1263.

In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

EDWARD CONWAY,
PETITIONER,

v.

CONSOLIDATED RAIL CORPORATION,
RESPONDENT.

Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

PHILANDER S. RATZKOFF,
ROBERT L. FARRELL,
PARKER, COULTER, DALEY & WHITE,
One Beacon Street,
Boston, Massachusetts 02108.
(617) 723-4500
Attorneys for the Respondent

On the Brief:
DEIRDRE H. HARRIS

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Questions Presented.

1. Whether this case presents no special and important reasons to warrant review by this Court, when the Court of Appeals for the First Circuit properly applied the law under the Federal Employers' Liability Act (45 U.S.C. §§ 51-60) and held that there was no evidence of negligence?

2. Whether the Court of Appeals for the First Circuit correctly applied the law of this Court and lower federal courts in holding that a plaintiff who testifies that he received no wages or pay or money whatsoever from "the railroad" has opened the subject of collateral wage substitution payments from the Railroad Retirement Board, thus making it a proper subject of inquiry for cross-examination?

3. Whether there is any conflict in the procedural law in the circuits on whether a plaintiff in a case under the Federal Employers' Liability Act has a "right" to suggest an overall figure for damages to the jury; or, if there is any conflict, whether the question is of sufficient importance to warrant the attention of this Court?

Table of Contents.

Table of Authorities Cited.

CASES.

STATUTES.

MISCELLANEOUS.

No. 83-1263.

In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

EDWARD CONWAY,
PETITIONER,

v.

CONSOLIDATED RAIL CORPORATION,
RESPONDENT.

Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Designation of Corporate Relationships.

Consolidated Rail Corporation was created by the Rail Reorganization Act, 45 U.S.C. § 701 *et seq.* and § 801 *et seq.* See especially 45 U.S.C. § 741. By the terms of the Act, debentures and securities (including preferred stock and common stock) are offered to the United States Railway Association, to employees through stock own-

ership programs, and to others. See 45 U.S.C. §§ 712(a)(3), 716(e)(3), 726(f), and 761.

The only subsidiaries which are wholly owned by Consolidated Rail Corporation are: Pennsylvania Trucklines, Rowayton River Railroad, and Buffalo Creek Railroad.

Statement of the Case.

A. *Facts.*

Respondent sets forth herein its statement of the facts, insofar as petitioner's statement is incomplete or misleading on certain points.

Peititioner was employed as a railroad conductor by respondent on the date of his accident, July 25, 1979 (A. 4-5).[1] He was injured when a piece of luggage (which he characterized as a "footlocker" or a "suitcase") that was being carried off the train by a woman passenger slid off the platform of the "trap" through which the passenger was descending, and hit petitioner in the chest (A. 8-11). The passenger was holding the luggage in her hand, by a handle, and when petitioner tried to help her, she "let the suitcase go and it came down on top of my chest." (A. 9-10.)

B. *Proceedings in the United States District Court.*

Counsel for petitioner stated at trial, in argument opposing respondent's motion for directed verdict, that his sole claim of negligence

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[1] Respondent has cited herein to the Record Appendix in Docket No. 83-1371, as petitioner has done. (See brief of petitioner at 4 n.*.) Although neither party has requested that the appendix be made part of the record in this Court, respondent has provided references herein in the event that the Court wishes to request that the appendix be sent from the Court of Appeals.

was the absence of a rule or regulation promulgated either by respondent or by Amtrak (which owned the train) that would have prohibited luggage over a certain unspecified size from being brought onto the train (A. 31, 154-156). In response to a question from the trial judge, counsel expressly disavowed any other theory of negligence, such as negligent supervision (A. 154-156).

The parties stipulated that there were no rules or regulations pertaining to the weight or size of luggage that could be carried aboard Amtrak coaches (A. 148). The petitioner introduced no evidence that any such rule or prohibition existed anywhere in the railroad industry, and no evidence that the entire industry acted unreasonably in not adopting such a rule. He introduced no evidence, via expert testimony or otherwise, to indicate what size and weight of luggage he was claiming respondent should have prohibited — indeed, there was no evidence of the weight of the piece of luggage that hit him, although he did estimate its size as "probably four feet long and probably two feet wide." (A. 81.)

Respondent rested at the end of petitioner's case (A. 149). The trial judge denied respondent's motion for directed verdict and submitted the case to the jury, which returned a verdict in the amount of $14,000 for petitioner, reduced to $7,000 for what the jury found to be petitioner's contributory negligence of fifty percent.

C. *The Rulings of the First Circuit.*

The sole issue in respondent's cross-appeal to the United States Court of Appeals for the First Circuit (hereinafter "the First Circuit") was whether the petitioner presented enough evidence of negligence to warrant presentation of the case to the jury. Petitioner also appealed.[2]

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[2]Petitioner's appeal was Docket No. 83-1344; respondent's cross-appeal was Docket No. 83-1371.

The First Circuit ordered judgment to enter for respondent, because petitioner had introduced no evidence of negligence.[3] *Conway* v. *Consolidated Rail Corp.*, 720 F.2d 221, 223 (1st Cir. 1983). In its published opinion, the First Circuit also disposed of petitioner's contention that it was error to exclude testimony that he had no authority to stop a passenger carrying a footlocker from boarding a train, noting that petitioner's counsel had stated to the jury, with no objection from respondent or the court, that petitioner had no such authority. *Id.* at 224. In a separate, unpublished opinion (which is reproduced in petitioner's appendix at 14a-16a), the First Circuit rejected the two remaining contentions made by petitioner in his appeal (Docket No. 83-1344).[4]

Further facts relating to the second and third issues that petitioner claims are presented by his petition are included in argument sections II and III herein.

Summary of Argument.

This case presents no "special and important reasons" within the meaning of Supreme Court Rule 17, for this Court to exercise its dis-

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[3]The First Circuit observed that petitioner "introduced no evidence that any other railroad had a rule on this subject . . . nor was there any expert testimony, either as to need, or how size should be regulated." 720 F.2d 221, 223 (1st Cir. 1983). The First Circuit underscored the basis of its holding when it denied petitioner's petition for rehearing. Although it rejected the petition for rehearing on the basis that it was untimely filed, it took the occasion to observe that "there is no merit [in the petition] in any event. We are not questioning or departing in any way from *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500 (1957), regarding causation, or the degree of negligence. Rather, we held, for reasons given, that there was no evidence of negligence whatever." (Brief for petitioner at 2a.)

[4]It held that: (1) petitioner, having raised "the issue of outside payments," could not object to respondent's inquiry on that subject; and (2) counsel was "in effect, proposing to testify" in attempting to suggest an overall figure for damages to the jury. (Brief for petitioner at 15a.)

cretion to reconsider the opinion of the First Circuit. The First Circuit has both stated and applied the law accurately. There has been no violation of petitioner's right to jury trial, because the First Circuit did not substitute its judgment for that of the jury. Rather, the First Circuit held that there was no evidence upon which a jury could find negligence (pp. 6-8).

Petitioner's remaining contentions are equally devoid of "special and important reasons" for this Court to grant a writ of certiorari. There is no conflict with this Court's decision in *Eichel* v. *New York Central R. Co.*, 375 U.S. 253 (1963), because in the instant case the petitioner testified concerning his non-receipt of collateral payments, thus opening the subject for impeachment purposes (pp. 8-10).

Finally, there is no conflict among the circuits with respect to the purported right of counsel for a plaintiff in a case brought under the Federal Employers' Liability Act to state to the jury his opinion concerning what amount of damages should be awarded, because the Second Circuit cases cited by petitioner do not unequivocally hold that there is such an absolute right. Any conflict is within the Second Circuit. In any event, this procedural question is not sufficiently important to warrant review by this Court (pp. 10-12).

Argument.

Initially, respondent notes that the second and third issues petitioner raises are moot. The First Circuit reversed because evidence of negligence was nonexistent, and the second and third issues both concern damages. In the event that the Court does not agree with this contention, however, respondent has formally argued the second and third issues herein.

I. THE REVIEW OF THE RECORD BY THE COURT OF APPEALS FOR THE FIRST CIRCUIT, WHICH FOUND THE RECORD DEVOID OF ANY EVIDENCE OF NEGLIGENCE, WAS PROPERLY WITHIN THE COURT'S POWER AND BASED ON AN ACCURATE STATEMENT OF THE LAW, AND DID NOT DEPRIVE THE PETITIONER OF A JURY TRIAL.

Petitioner argues that the First Circuit effectively deprived him of a jury trial by reviewing the record and holding that there was no evidence of negligence, and that respondent was entitled to a directed verdict as a matter of law.

The First Circuit accurately stated the law concerning standards of proof in cases brought under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (hereinafter "FELA"). See generally *Burrell* v. *McCray*, 426 U.S. 471 (1976) (Stevens, J., concurring in dismissal of writ of certiorari) (no need to grant certiorari if law stated and applied accurately). Liability may only be imposed, by the terms of § 51 of FELA, for injury or death "resulting in whole or in part from the negligence of any of the offices, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence . . . ." It has been uniformly held that the FELA plaintiff must show *some* causal negligence on the part of the employer; the FELA is not a workers' compensation statute. E.g., *O'Hara* v. *Long Island R. Co.*, 665 F.2d 8, 9 (2d Cir. 1981); *New York, New Haven & Hartford R. Co.* v. *Cragan*, 352 F.2d 463, 464 (1st Cir. 1965), cert. denied, 386 U.S. 1035 (1967).

The *Rogers* case,[5] upon which petitioner chiefly relies, merely characterized the FELA standard of proof of negligence as different from that of common law cases; the employee must show "that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U.S. at 506.

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[5] *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500 (1957).

The First Circuit held, properly, that the *Rogers* standard was not met. 720 F.2d at 223.[6] Petitioner's sole theory of negligence at trial had been the failure to have an absolute prohibition, in the form of a rule or regulation, which would have kept the luggage in question off the passenger car of the train. In reversing the judgment of the trial court, the First Circuit relied in part on *Kuberski* v. *New York Central R. Co.*, 359 F.2d 90, 95 (2d Cir. 1966), cert. denied, 386 U.S. 1036 (1967).

In *Kuberski* the plaintiff based his claim of negligence upon failure of the defendant railroad to have a "motor scooter" which would have carried equipment to assist employees in closing doors. The plaintiff claimed that such equipment would have prevented his accident. The Second Circuit rejected this theory, on the ground that the plaintiff had introduced no evidence to show that it was good industry practice to have such a scooter (or equipment) accessible to employees. Alternatively, the *Kuberski* court observed, the plaintiff could have followed the rationale of *The T.J. Hooper*, 60 F.2d 737 (2d Cir.), cert. denied sub nom. *Eastern Transp. Co.* v. *Northern Barge Corp.*, 287 U.S. 662 (1932), and introduced evidence that the entire railroad industry somehow "unduly lagged" in not having such a scooter available. This he had also failed to do. *Kuberski, supra*, 359 F.2d at 93, quoting from *The T.J. Hooper, supra* at 740.

In the present case, as in *Kuberski*, there was no evidence upon which a jury could base a finding that it was negligent for the respondent to fail to promulgate a rule (or to ascertain that Amtrak had promulgated a rule) to exclude luggage, except the happening of this accident. Furthermore, as the First Circuit observed in its published opinion, by petitioner's testimony this was the first accident of this type that he knew of in twenty-seven years of employment with respondent. Thus, there was also no evidence of foreseeability. 720 F.2d at 223-224.

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[6] Although the First Circuit did not cite *Rogers* in its principal opinion, it did refer to the *Rogers* standard in ruling on the petition for rehearing. See note 3, *supra*.

Although the First Circuit expressed its views on the advisability of such a proposed rule, it was not substituting its judgment for that of the jury on that question. Rather, it held that there was "no evidence of negligence whatever" upon which a jury could base a verdict (see brief for petitioner at 2a).

In summary, the First Circuit both stated and applied the law correctly. There has been no denial of a right to jury trial. This case presents no "special and important reasons" for the Court to reconsider the First Circuit's review of the evidence. See generally *Rice* v. *Sioux City Mem. Park Cemetery*, 349 U.S. 70 (1955).

II. There is no Conflict Between the Decision of the First Circuit in This Case and any Decision of This Court.

Petitioner claims that the trial court's ruling allowing counsel for respondent to question petitioner concerning his receipt of benefits from the Railroad Retirement Board directly conflicts with the decision of this Court in *Eichel* v. *New York Central R. Co.*, 375 U.S. 253 (1963). There is no such conflict.

Respondent has reproduced in its appendix the full portions of the trial transcript in which disability benefits were raised. In summary, petitioner's counsel inquired of petitioner whether he had received "vacation pay or anything," "wages," and whether he was "paid any money whatsoever by the railroad for the 83 days [he was] out of work." (A. 17, 147.)

Petitioner answered all questions in the negative, and responded to the last question by saying, "I wasn't paid one penny." (A. 147.) Although the judge initially sustained petitioner's objection, respondent's counsel was permitted after the last exchange to inquire whether petitioner was paid "a weekly sum of money by the Railroad Retirement Board for the period of time you were out." (A. 147.) Petitioner testified he received approximately $125.00 per week

(A. 147), and the trial judge immediately instructed the jury that "that information is irrelevant" in light of the stipulation that lost wages were $7,591 (A. 148). He further told the jury that if they found liability, "then you will include in your consideration $7,591, and whatever other damages that I will define for you that he may be entitled to." (A. 148.)

The collateral source rule precludes admission of evidence of benefits paid by a source independent of the tortfeasor, unless the evidence is probative on an issue such as credibility. M. Minzer et al., Damages in Tort Actions §§ 17.00, 17.02[3] (1982). The *Eichel* case stands for the basic collateral source rule in the FELA context. However, the *Eichel* case did not involve a situation in which the plaintiff-employee opened up the subject of collateral payments, and therefore is not on point. See *Gladden* v. *P. Henderson & Co.*, 385 F.2d 480 (3d Cir. 1967) (distinguishing *Eichel*), cert. denied, 390 U.S. 1013 (1968). See also *Hannah* v. *Haskins*, 612 F.2d 373, 375 (8th Cir. 1980).

It is a basic principle of the law of evidence that on cross examination, defense counsel may inquire into matters opened by plaintiff's counsel on direct examination, and matters affecting the credibility of a witness. Fed. R. Evid. 611(b). Once an FELA plaintiff has opened, on direct examination, the issue of payments from a collateral source, the defendant is entitled to cross examine him on the subject. *Hannah, supra*; *Gladden, supra*.

Petitioner, in his petition before this Court, argues that he testified only that he had received no payments from respondent, and that the Railroad Retirement Board "is entirely separate and distinct from [respondent]." (Brief for petitioner at 19.) The fair meaning of questions posed by petitioner's counsel, and of petitioner's responses, however, is that petitioner was receiving no payments of any kind during his disability period, and was left destitute. The trial judge, and the First Circuit, ruled properly that the subject had been opened by petitioner, and respondent was entitled to explore the subject

under Rule 611 (b) and the above-cited cases. Hence, there is no conflict between the First Circuit's decision and *Eichel*, and review by this Court is not warranted.

III. THERE IS NOT NECESSARILY A "RIGHT" TO SUGGEST A FIGURE FOR DAMAGES TO THE JURY IN FELA CASES IN ANY CIRCUIT, AND THUS NO CONFLICT AMONG THE CIRCUITS; EVEN IF THERE IS A CONFLICT THE QUESTION IS NOT IMPORTANT ENOUGH TO DESERVE CONSIDERATION BY THIS COURT.

Petitioner argues that "the right of counsel to suggest damage figures to a federal jury deciding a personal injury case is an important federal procedural issue not yet ruled on by this Court." (Brief for petitioner at 19.) The cases he relies upon for the proposition that the "practice . . . is firmly established in the Second Circuit" are *Modave* v. *Long Island Jewish Medical Center*, 501 F.2d 1065, 1079 (2d Cir. 1974); *Mileski* v. *Long Island R. Co.*, 499 F.2d 1169, 1174 (2d Cir. 1974); and *Philadelphia & Reading R. Co.* v. *Skerman*, 247 F. 269, 271 (2d Cir. 1917).

To the extent that the above cases and later cases construing them recognize a practice in the Second Circuit, the practice apparently is to allow the trial judge discretion whether to permit counsel to suggest a figure for damages during summation. For example, *Mileski* held that the court did not abuse its discretion in allowing references to the amount plaintiff's counsel thought the jury should award for pain and suffering, because defense counsel had not objected or sought curative instruction and, in the absence of such objection and request, the reference was held not to be reversible error. See 499 F.2d at 1174.

Furthermore, the *Skerman* case applied New York law on this point, and thus is of no precedential value in this case.[7] Also, the case held that the judge's charge to the jury (to disregard the reference to amount of damages) had cured any prejudicial effect. 247 F. at 271.

In the *Modave* case, counsel had suggested to the jury that a just verdict " 'should be in the neighborhood between $850,000 and $900,000.' " The Second Circuit relied on the *Skerman* case to the effect that " 'counsel has a clear right to state what the plaintiff asks and expects to recover for his injuries,' " although it said that the trial judge should have given a cautionary instruction if requested. *Modave, supra* at 1079.

Assuming arguendo that the Second Circuit adopted the New York procedural rule in *Skerman* and *Modave*, respondent maintains that later cases in the Second Circuit, at both the trial and appellate levels, have modified the holding that there is a "right" to suggest figures to the jury. For example, the Southern District of New York stated in 1975 that counsel "are permitted to express their opinion as to general damages . . . particularly where no objections to the opinions were expressed by [the appellant's] counsel." *Guerrero* v. *American President Lines, Ltd.*, 394 F.Supp. 333, 337 (S.D.N.Y. 1975). Also in 1975, the Eastern District of New York gave a plaintiff a choice of new trial or remittitur, on the basis of excessiveness of a verdict, and speculated that the excessiveness may have been due to counsel's suggestions of figures and the judge's failure to give a sufficiently strong curative instruction. *Uris* v. *Gurney's Inn Corp.*, 405 F.Supp. 744, 747 (E.D.N.Y. 1975).

Respondent has not located any case in which the Court of Appeals for the Second Circuit has expressly considered the issue since *Modave*, although it did affirm without opinion a case in which the trial court reduced a verdict and observed that it should have

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[7]New York is one of the few jurisdictions in which there is case law to the effect that plaintiff's counsel is entitled to mention the amount sought. See *Rice* v. *Ninacs*, 312 N.Y.S. 2d 246, 251 (1970).

cautioned the jury that it was not bound by counsel's suggestion of a figure. *Pirre* v. *Printing Developments Inc.*, 614 F.2d 1290 (2d Cir. 1979), affirming 468 F.Supp. 1028 (S.D.N.Y. 1979). See 468 F. Supp. at 1038 n.8.

In the instant case, the opinion of the First Circuit on this question was brief: it merely stated that "[c]ounsel was, in effect, proposing to testify. The court was correct in excluding." See note 4, *supra*. This is not necessarily to be construed as an absolute prohibition against suggesting figures, but can as easily be read to mean that the trial judge correctly exercised his discretion in the circumstances.

The discretionary approach is also followed by the Fourth Circuit. See *Murphy* v. *National R. Passenger Corp.*, 547 F.2d 816, 818 (4th Cir. 1977). Furthermore, at least one of the Second Circuit cases (*Mileski*) suggests that the judge has discretion to disallow such comment. *Mileski*, *supra* at 1174. Therefore, it would appear that if there is any conflict, it is within the Second Circuit, and not between or among circuits.

In addition, respondent respectfully suggests that, even if there is a conflict among the circuits, the issue is not of sufficient import to meet the requirement of Rule 17 that certiorari be granted only for "special and important reasons." It is a procedural question, and the Second Circuit practice is not clearly established. The mentioning of figures proved prejudicial in *Pirre* and *Uris*, both *supra*, in both of which an excessive verdict was tied to counsel's suggestion. Since *Mileski* and *Modave* seem to conflict on whether the suggestion of figures is a matter of right or of discretion, perhaps the conflict should be resolved initially in the Second Circuit. In any event, it does not presently merit the attention of this Court.

Conclusion.

For the foregoing reasons, respondent respectfully submits that the present case presents no "special and important reasons" for which a writ of certiorari should be granted, and respectfully requests that the petition be denied.

Respectfully submitted,

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Appendix

Relevant parts of trial transcript concerning disability benefits.

The following interchanges occurred during the trial concerning disability benefits. On direct examination, Petitioner's counsel inquired:

> Q. Sir, did you receive any vacation pay or anything during the eighty-three days you were off?
>
> A. No, I didn't.
>
> Q. Did you receive any wages at all during the eighty-three days you were off?
>
> A. No.

On cross examination, counsel for Respondent began the following exchange:

> Q. Now, you testified on direct examination that for the twelve weeks that you were out, or the eighty-three days that you were out, you received no pay. Do you remember that testimony?
>
> A. Yes, I did.
>
> [COUNSEL FOR PETITIONER]: Objection. He lost wages, Your Honor.
>
> [COUNSEL FOR RESPONDENT]: The word is pay.

THE COURT: Well, in any event, he says he remembers it, so, the jury will recall what he said or didn't say.

Q. [COUNSEL FOR RESPONDENT]: As a matter of fact, during the entire period of time, those twelve weeks, you did receive money from the railroad, didn't you?

[COUNSEL FOR PETITIONER]: Objection, Your Honor.

After a brief interchange in which Respondent's counsel stated that he was inquiring on the issue of credibility, the court sustained the objection of Petitioner's counsel.

On redirect examination, Petitioner's counsel asked:

Q. Mr. Conway, were you paid any money whatsoever by the railroad for the 83 days you were out of work?

A. I wasn't paid one penny.

On further recross examination by counsel for Respondent, the following exchange occurred:

Q. Mr Conway, were you paid a weekly sum of money by the Railroad Retirement Board for the period of time you were out?

[COUNSEL FOR PETITIONER]: Objection, Your Honor.

THE COURT: The objection's overruled.

Q. [COUNSEL FOR RESPONDENT]: Were you paid a weekly sum of money by the Railroad Retirement Board for every week that you were out of work?

A. Yes.

Q. And, how much were you paid by the Railroad Retirement Board per week?

[COUNSEL FOR PETITIONER]: Objection, Your Honor.

THE COURT: Overruled.

THE WITNESS: Approximately $125 a week

[COUNSEL FOR RESPONDENT]: No further questions.

THE COURT: Any other questions?

[COUNSEL FOR PETITIONER]: No, Your Honor.

THE COURT: All right. You may step down.

The court immediately instructed the jury as follows:

Now, ladies and gentlemen of the jury, essentially I want to advise you that that information is irrelevant. The fact of the matter is that the parties have agreed, have stipulated to, and that's the evidence upon which you're going to make your determination. That there was, that the lost wages of the plaintiff amount to $7,591. If you,

subsequently, if you are to find that the plaintiff is entitled to damages because of negligence of the railroad, of the defendant, which gave rise to those damages, then you will include in your consideration $7,591, and whatever other damages that I will define for you that he may be entitled to. And so, at least, though, there is no disagreement that his lost wages, which he may be entitled, amount to $7,591.

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